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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955

No. 933

JAMES ALVADO, *et al.*,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Definitions and Abbreviations

The Act	—The Selective Training and Service Act of 1940, as amended, 54 Stat. 885, F.C.A. 50 Appx. 308.
The Union	—International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, the duly certified collective bargaining agent for petitioners.
The 1946 Agreement	—Collective bargaining agreement between the Corporation and the Union dated March 19, 1946.
Pet. App.	—Petitioners' Appendix to Brief in Circuit Court of Appeals.
Resp. App.	—Respondent's Appendix to Brief in Circuit Court of Appeals.

Statement of the Case

Petitioners' statement includes much argument and comment. The record facts are as follows:

According to the complaint, this action was instituted to recover, in behalf of the petitioners and other veterans similarly situated, vacation pay for the fiscal year ending June 30, 1946, which allegedly was denied by the 1946 Agreement entered into by respondent and petitioners' duly authorized representative, the Union.

The named petitioners are both veterans and hourly-rate employees of the respondent. Alvado is employed at the Fisher Body Division plant of the respondent, located at North Tarrytown, New York, and Bilbee at the Allison Division plant of the respondent, located at Indianapolis, Indiana. Each left his position of employment with the respondent to enter military service, applied seasonably for reinstatement to his job, and has otherwise met the requirements for reinstatement under Section 8 of the Act. The data concerning their employment and relevant earnings are as follows:

The named petitioners were at all times mentioned in the complaint represented by the Union. The National Labor Relations Board duly certified the Union as the bargaining agent of the petitioners.

Mr. Louis G. Seaton is the respondent's Labor Relations Director who has been its principal negotiator since 1946 and who participated in collective bargaining discussions with the Union. In his affidavit he relates the across-the-table talks with petitioners' representative, the Union, which preceded the 1946 Agreement. There was no "rule or practice" established by the respondent as to vacation allowance. Mr. Seaton's affidavit (Resp. App. 6b, 8b-21b) recites that prior to 1940 there was no vaca-

tion pay and since 1940 vacation allowance for hourly-rated employees has been the subject of annual negotiations and agreement between the respondent and the Union. This statement remains uncontested in the record. Indeed, no answering affidavits were submitted by the petitioners, although a cross motion for Summary Judgment was made in their behalf (Pet. App. 22a).

According to the complaint, the named petitioners and the class to which they belong and in whose behalf this action is purportedly brought are those employees of the respondent whose vacation pay is governed by the 1946 Agreement; who entered military service; and who were reinstated as employees by the respondent between July 1, 1945 and June 30, 1946.

Petitioner Alvado has been compensated for the vacation allowance to which he was entitled on the same basis as all other employees, both veterans and non-veterans, under the respondent's 1946 Agreement with the Union.

Bilbee was not in the active employ of the respondent during the year 1945 and received neither wages nor vacation allowance for that period. Apparently recognizing that his rights had previously been litigated to a final judgment in *Foster & Bilbee* v. *General Motors Corp.* (C. A. 7, 1951), 191 F. 2d 907, cert. den. 343 U. S. 906, rehear. den. 343 U. S. 937, he executed a sworn statement, submitted by the respondent in its motion for Summary Judgment, stating that he makes no present claim against the respondent (Resp. App. 22b).

The 1946 Agreement

In the fall of 1945, in accordance with their usual procedure, the respondent and the Union commenced negotiations looking toward a new collective bargaining agreement, including provisions for vacation allowance for the year 1946 (Resp. App. 15b-18b). While these negotiations were in progress, the Union called a strike which commenced on November 21, 1945 and lasted until March 13, 1946. This affected all hourly-rated employees in more than 100 of the respondent's plants. The negotiations (including those relating to vacation allowance) continued throughout the strike period.

An agreement was ultimately reached and signed in March 1946 by both the respondent and the Union, the petitioners' duly appointed bargaining agent. The provision for vacation allowance was suggested by and insisted upon by the petitioners' own agent, the Union. It reads as follows (Resp. App. 18b-19b):

> "(151) Any employe with one or more years' seniority as of July 1, 1946, who works during the pay period beginning June 24, 1946, and ending June 30, 1946, in any General Motors plant or who has been laid off after May 1, 1946, shall be eligible for vacation allowance on the following basis:
>
> (a) Any employe with one year but less than three years' seniority as of July 1, 1946, shall be compensated on the basis of 2% of his gross earnings for the period from January 1, 1945 to December 31, 1945.
>
> (b) An employe with three years' but less than five years' seniority as of July 1, 1946 shall be compensated on the basis of 3% of his gross earnings for the period from January 1, 1945, to December 31, 1945.
>
> (c) An employe with five years' or more seniority as of July 1, 1946 shall be compensated on the basis

of 4½% of his gross earnings for the period from January 1, 1945 to December 31, 1945.

Each factory employe having one or more years' seniority who is ineligible for vacation pay under the first paragraph above, shall be entitled to a vacation allowance as provided in Paragraphs a, b and c, above, based upon his seniority as of July 1, 1946, provided he has worked during 26 pay periods between the dates of July 2, 1945 and June 30, 1946 in General Motors plants. The vacation allowance of such employes shall be based upon their gross earnings in all General Motors plants during the calendar year 1945.

Payment shall be made not later than July 31, 1946."

A complete account of the respondent's proposals to the Union, relating to vacation pay during the collective bargaining, the Union's counter-proposals, and the final acceptance by the petitioners of the Union's demands, is set forth in detail in Seaton's affidavit (Resp. App. 4b).

The District Court granted respondent's motion for Summary Judgment (Pet. App. 24a). The Court of Appeals for the Second Circuit, although agreeing with the District Court's interpretation of Section 308 (c), reversed on the ground that petitioners were entitled to a trial on the issue of respondent's alleged intention to discriminate against veterans in entering into the terms of the 1946 Agreement. Apparently the petitioners have no desire for such a trial and here seek a review of the Court of Appeals construction and application of the settled principles relating to Section 308 (c).

The Court, following well established principles, simply held that vacation pay does not come within those provisions of the Act insuring restoration of a veteran's rights without loss of seniority and that since vacation pay was subject to annual negotiation and agreement between the parties, the petitioners were not entitled as a matter of law to vacation pay under the "other benefits" clause of the Act.

Argument

1. This Court Has Already Declined to Review the Decision of Two Other Courts of Appeals Reaching the Same Result on the Identical Facts and the Same Issues.

In *Dougherty* v. *General Motors Corp.*, (C. A. 3, 1949) 176 F. 2d 561, the Petition for Certiorari was denied. (1950, 338 U. S. 956). The facts, as stated in the opinion of the Court of Appeals for the Third Circuit, indicate that the respondent's 1946 Collective Bargaining Agreement with the Union was there under attack and the same claim was made for relief under the Act. In a second case, this Court also denied certiorari, *Foster* v. *General Motors Corp.*, 343 U. S. 906, rehear. den. 343 U. S. 937. Again the respondent's 1946 Collective Bargaining Agreement was assailed. (See facts stated in official report, *Foster* v. *General Motors Corp.*, 191 F. 2d 907.) In both of these cases, the Courts held that none of the veterans' rights under the Act were violated.

2. The Questions Here Presented Have Been Harmoniously Decided by All of the Courts of Appeals Which Have Ruled On Them.

There is abundant authority for the determination of the Court below that vacation pay does not come within those provisions of the Act insuring restoration of a veteran's rights without loss of seniority. The District Court here applied this well-established principle to the facts at bar and stated in part (Pet. App. 24a):

> "Vacation pay is not incident of seniority but *compensation for work actually done.* • • • It would not, therefore, constitute discrimination to returning veterans to deny them vacation pay unless it was an established rule of the company to give vacation pay to those on leave of absence." (Italics supplied.)

Siaskiewicz v. *General Electric Co.* (C. A. 2, 1948) 166 F. (2d) 463; *Dwyer* v. *Crosby Co.* (C. A. 2, 1948)167 F. 2d 567. See also *Brown* v. *Watt Car & Wheel Co.* (C. A. 6, 1950) 182 F. 2d 570, cert. den. 340 U. S. 875, where the Court of Appeals, in affirming the dissmissal of Brown's complaint, stated in part (182 F. 2d 570 at p. 572):

> "Sec. 8(c) provides that the veteran shall be restored to his position 'without loss of seniority'. We do not agree with the contention that 'seniority' includes vacation with pay. * * * Accordingly, vacation with pay comes from the union contract; it is not an element of seniority. The stipulated facts state that appellant was restored to his former position 'with the pay and seniority of said position'. That provision of the statute has been complied with, although it has not resulted in giving appellant two weeks' vacation with pay under the contract."

These decisions are not in conflict with the rule established by this court in *Diehl* v. *Lehigh Valley R. R. Co.* (1954), 348 U. S. 960 and *Oakley* v. *The Louisville & N. R. Co.* (1949), 338 U. S. 278, which reiterated the doctrine of *Fishgold* v. *Sullivan Drydock & Repair Corp.* (C. A. 2, 1946) 154 F. 2d 785, aff'd 328 U. S. 275, that as to "seniority status" a veteran is entitled to step back on the escalator at the precise spot he would have been had he remained in continuous civilian employment. They are not pertinent with respect to vacation pay and allowances which constitute "other benefits" under the Act.

Further, the holding below, that since vacation pay was subject to annual negotiation and agreement the petitioner was not entitled, as a matter of law, to recover under the "other benefits" clause of Section 308(c), is also in accord with the cases relating to vacation pay. As respondent's pre-1946 collective bargaining agreements were negotiated and changed annually, there was no established rule or practice as to vacation pay at the time petitioners

entered military service (Resp. App. 8b-21b). *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Aeronautical Industrial Dist. Lodge* v. *Campbell* (1949), 337 U. S. 521; *Levine* v. *Berman* (C. A. 7, 1949) 178 F. 2d 440, cert. den. (1950) 339 U. S. 982. See also *Dougherty* v. *General Motors Corp., supra* (C. A. 3, 1949) 176 F. 2d 561, cert. den. 338 U. S. 956; *Foster* v. *General Motors Corp., supra* (C. A. 7, 1951) 191 F. 2d 907, cert. den. 343 U. S. 906, rehear. den. 343 U. S. 937; *Brown* v. *Watt Car & Wheel Co., supra* (C. A. 6, 1950) 182 F. 2d 570, cert. den. 340 U. S. 875; *Woods* v. *Glen Alden Coal Co.* (D. C. M. D. Pa., 1947) 73 F. Supp. 871; *Monticue* v. *Baltimore & O. R. Co.* (N. D. Ohio, 1950), 91 F. Supp. 561.

The distinction between "loss of seniority" and "other benefits" was also considered at the time of the adoption of Section 8(c). Cf. Colloquy of Congressman Harness and the Chairman of the Military Affairs Committee of the House (86 Cong. Rec. 10761):

> "Mr. Harness: We all know what it means when we say, 'Without loss of Seniority'. We know what it means to say without loss of insurance participation, but what does it mean when it refers to other benefits? Does that mean that the employer during the year that this man is in the service must continue to pay his social security, his unemployment compensation and so forth?
>
> "Mr. May: I do not think it means that."

3. The Determination of the Court Below Does Not Conflict With the Third Circuit's Decision in *Mentzel* v. *Diamond*.

In *Mentzel* v. *Diamond* (C. A. 3, 1948) 167 F. 2d 299, the collective bargaining agreement with respect to vacation pay stated as follows:

"Employees shall receive vacations of one week with pay after one year' service; vacations of two weeks with pay after five years of service. * * *"

The Third Circuit properly held that the plaintiff-employee was entitled to two weeks' pay since his service in the armed forces should be considered in computing length of his service with his employer. This is merely an extension of the *Fishgold* decision that a veteran has the right under the Act not to lose his position or seniority by virtue of his absence in naval or military service. The case does not hold that such seniority includes a right to vacation pay on a basis different than other employees. It is significant that the decision of the Third Circuit in the *Mentzel* case was handed down in the March term in 1948. Thus, the Third Circuit had already decided the *Mentzel* case when it denied the right of a veteran to vacation pay under the Act under the same facts and in considering the same issues here presented. See *Dougherty* v. *General Motors Corp., supra*, (C. A. 3, 1949) 176 F. 2d 561, cert. den. 338 U. S. 956. Indeed, the determination in the Mentzel case was referred to this Court in Dougherty's Petition for Certiorari in 1949 which was denied.

Conclusion

Petitions are here objectiing to the vacation pay provisions of a collective bargaining agreement which were adopted after long negotiations between their own collective bargaining agent, the Union, and the respondent. They instituted the attack by filing their complaint on July 30, 1952, slightly more than six years after the culmination of the collective bargaining in 1946.[1] Since the petitioners are

1. Cf. *Donner* v. *Levine* (not officially reported) C. A. 2, (April, 1956, No. 239) 37 LRRM 2808, where the Court dismissed a veteran's suit under the Act on the ground of laches because of an unexplained delay of over three years in instituting the suit.

not entitled to preferred treatment over non-veterans on furlough or leave of absence in 1945, they are not entitled to vacation pay as an incident of Seniority, or under the "other benefits" clause of the Act. The Petition is without merit and should be denied.

Respectfully submitted,

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